88-1270

No. - .

Supreme Court, U.S.
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In the

Supreme Court of the United States.

OCTOBER TERM, 1988.

WILLIAM D. PETRAS,
PETITIONER,

v.

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

Petition for a Writ of Certiorari to the Massachusetts Supreme Judicial Court.

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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

Question Presented.

Whether the Commonwealth of Massachusetts, having employed grand jury procedure, and failing to uphold the basic protection against unfounded criminal prosecution, deprived the petitioner of due process of the law as required by the Fourteenth Amendment to the United States Constitution.

Parties to the Proceeding.

Petitioner, William D. Petras, is joined to appellees below, William Marrocco and Charles Camirand.

Respondent, who was appellant below, is the Commonwealth of Massachusetts.

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WILLIAM D. PETRAS,
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v.

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

Petition for a Writ of Certiorari to the Massachusetts Supreme Judicial Court.

The petitioner, William D. Petras, respectfully prays that a writ of certiorari issue to review the Massachusetts Appeals Court's reversal of the decision of the of the Middlesex Superior Court, thereby depriving him of due process of law as required by the Fourteenth Amendment.

Opinions Below.

The opinion of the Massachusetts Appeals Court in this case is reported at 26 Mass. App. Ct. 483, 529 N.E.2d 404 (1988) and is reprinted in the appendix herein at 1a; the memorandum and decision of the Superior Court (Grabau, J.) is at 9a; Judge Zobel's memorandum and decision is at 12a; the application to obtain further appellate review to the Supreme Judicial Court is at 15a; and the order denying the application at 24a.

Jurisdiction.

The petitioner invokes the jurisdiction of this Court pursuant to the provisions of 28 U.S.C. § 1257(3).

Statute Involved.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution states:

> SEC. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case.

On May 29, 1986, upon motion of defendant William D. Petras, indictments against him for aggravated rape and assault

upon complainant Renee Parah were dismissed without prejudice by the Superior Court because the prosecutor failed to alert the grand jury to material inconsistent statements made by the complainant (A. 9a-11a).

On June 17, 1986, the same prosecutor, in seeking to reindict Petras for the same alleged crimes, presented the same complainant to another grand jury and, again, was found to have failed to alert that grand jury to the complainant's prior material inconsistent statements as well as to an additional inconsistent statement.

Petras again moved for dismissal of the indictments, and on September 25, 1986, the motion was allowed by the Superior Court, with prejudice, as to the indictments involving complainant Parah (A. 12a-14a).

On September 8, 1988, the Commonwealth of Massachusetts Appeals Court reversed the judgments of the Superior Court (A. 1a).

Application for further appellate review to the Supreme Judicial Court for the Commonwealth was denied on November 30, 1988 (A. 15a-24a).

It is from the decision, which reversed the actions of the Superior Court that this petition arises.

Reasons for Granting the Writ.

THE MASSACHUSETTS APPEALS COURT FAILED TO CONSIDER THE GRAND JURY'S FUNCTION TO PROTECT THE PETITIONER AGAINST UNFOUNDED CRIMINAL PROSECUTION AND THEREBY DEPRIVED HIM OF DUE PROCESS OF LAW AS REQUIRED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Fifth Amendment's requirement that no person shall be held to answer for a capital or otherwise infamous crime, unless

on a presentment or indictment of a grand jury does not apply to the States. *Hurtado* v. *California,* 110 U.S. 516, 4 S.Ct. 111, 28 L.Ed. 232 (1884); *United States* v. *Mandujano,* 425 U.S. 564, 96 S.Ct. 1768, 48 L.Ed.2d 212, *on remand,* 539 F.2d 106 (5th Cir. 1976); *United States* v. *Dionisio,* 410 U.S. 1, 93 S.Ct. 764, 35 L.Ed.2d 67 (1973); *Branzburg* v. *Hayes,* 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972).

It is the position of the petitioner that whether it was necessary for the Commonwealth of Massachusetts to use a grand jury is immaterial. It was used and, therefore, the Due Process Clause of the Fourteenth Amendment requires that it be used in a fair and nonarbitrary manner.

The grand jury has the dual function of determining if there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecution. *United States* v. *Mandujano, supra*; *United States* v. *Dionisio, supra*; *United States* v. *Calandra,* 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974); *Lataille* v. *District Court of Eastern Hampden,* 366 Mass. 525, 320 N.E.2d 877 (1974).

The only facts established in the case at bar are those that were found by Middlesex Superior Court Judge Grabau in May 1986, and by Superior Court Judge Zobel in September 1986.

Judge Grabau found:

> 1. Parah had written a statement that Petras merely "tried" to have intercourse with her, in contradiction to her subsequent statement that he was the "one who had intercourse";
>
> 2. This inconsistent statement went to the very heart of the rape indictment;
>
> 3. If the grand jury had been made aware of this inconsistency, it is likely to have affected its decision to indict;

4. This evidence was known to the prosecutor;

5. Parah was the most important witness to testify before the grand jury;

6. The Lahey Clinic Medical Center report indicated Parah said she thought there was no vaginal penetration and the person preparing the report noted there was a question of penetration; and

7. These prior inconsistent statements should have been presented to the grand jury. (A. 10a-11a.)

Upon finding the above facts, Judge Grabau dismissed the indictments, but gave the prosecutor a second chance to indict Petras by dismissing the indictments "without prejudice" (A. 4a, 11a).

The same prosecutor, less than a month later, on June 17, 1986, sought re-indictment of Petras by a new grand jury for the same alleged offenses (A. 4a, 13a). Again, he presented complainant Renee Parah (A. 4a).

After hearing Petras' second motion to dismiss, Judge Zobel found the following facts:

1. Parah's testimony under oath at the probable cause hearing was so at variance with her grand jury testimony as to greatly undermine her credibility;

2. The assistant district attorney who was presenting the matter knew of the prior testimony, but did not bring it to the attention of the grand jury;

3. Even though less than one month earlier, Judge Grabau had dismissed the indictments under a similar situation, no explanation was offered as to why the prosecutor did not inform the grand jury that his star witness had given sworn testimony before a judge that would directly contradict what she was telling the grand jury;

4. The conduct of the prosecutor fell short of his duty to alert the grand jury to the existence of important exculpatory evidence;

5. Nowhere in his examination of the witness did the assistant district attorney so much as hint at the existence of contradictory evidence; and

6. Petras' indictments resulted from a presentation inexcusably inadequate in constitutional terms. (A. 5a, 12a-14a.)

The Massachusetts Appeals Court in their decision to reverse Judge Zobel, simply stated:

> We do not agree with these conclusions.
>
> A prosecutor may not withhold known exculpatory information which could undermine the credibility of an important witness in the eyes of a grand jury and, consequently, affect their decision to indict. . . . The prosecutor here was acutely aware from the prior dismissal that the next grand jury to hear the cases should be alerted to possible inconsistencies in Carol's version of the incident. He complied with the order of the first Superior Court judge to bring to the attention of the second grand jury the information pertaining to Petras contained in Carol's statement to the police and in the hospital record.[7]
>
> . . . . . .

[7] Counsel for Petras argues that the prosecutor did not adequately cure the deficiencies identified by the first judge. We conclude that he did.

(A. 5a-6a.) (Citations omitted.)

No further explanation was offered as to how the deficiencies identified by Judge Grabau were corrected. It is respectfully

argued that an acutely aware prosecutor should have made any identified deficiencies crystal clear to the second grand jury.

The Massachusetts Appeals Court then focused on an additional inconsistent statement made by complainant Renee Parah to the second grand jury and not brought to their attention by the prosecutor. Complainant Renee Parah testified in court, under oath, that although defendant Marrocco "tried" to get his penis into her mouth, she "wouldn't open it" and that Marrocco did not penetrate "any part" of her body with "any part of his body." (A. 3a n.2.) However, her testimony to the second grand jury included the statement:

> THE PROSECUTOR: "What was Mr. Marrocco doing while Mr. Petras was doing that to you?
>
> CAROL: "He was trying to get his penis into my mouth, and then he succeeded."

(A. 4a n.4.) The Appeals Court addressed this issue by inserting the following footnote:

> Finally, because the Commonwealth has stated that its rape case against Marrocco is predicated on a joint venture theory, we think, in fairness, that it should be limited to that theory at trial. The Commonwealth will not be able to contend at trial that Marrocco raped Carol [complainant Renee Parah] by inserting his penis into her mouth.

(A. 8a n.10.)

It is respectfully submitted that this footnote confirms Judge Zobel's finding that Parah's testimony under oath at the probable cause hearing was so at variance with her grand jury testimony as to greatly undermine her credibility.

It is further argued that the Massachusetts Appeals Court by failing to focus on the pattern of inconsistent statements made by complainant Renee Parah (each time she told her story, it became more incriminating), did not protect the petitioner against unfounded criminal prosecution.

Conclusion.

For the foregoing reasons, *inter alia*, the petitioner contends that he has been denied due process of law as required by the Fourteenth Amendment to the United States Constitution.

Respectfully submitted,

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Appendix.

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COMMONWEALTH *vs.* WILLIAM D. PETRAS (and five companion cases [1]).

No. 87-1146.

Middlesex. September 8, 1988. — October 17, 1988.

Present: GREANEY, C.J., BROWN, & KASS, JJ.

Practice, Criminal, Indictment, Dismissal, Grand jury proceedings, Disclosure of evidence, Argument by prosecutor. *Grand Jury. Evidence,* Grand jury proceedings.

Criminal defendants were not entitled to dismissal of indictments on the ground that the integrity of the grand jury proceedings was impaired by the prosecutor's failure, after being warned once before by another judge, to bring to the grand jury's attention an inconsistent statement by the victim at the probable cause hearing on the cases, where nothing in the record demonstrated that the prosecutor knowingly distorted any evidence or withheld exculpatory information, which, if revealed, would have influenced the grand jury not to indict, and where, in any event, the defendants demonstrated no prejudice. [487-490]

INDICTMENTS found and returned in the Superior Court Department on June 25, 1986.

Motions to dismiss were allowed by *Hiller B. Zobel,* J.

William G. Burke for William D. Petras.

David R. Marks, Assistant District Attorney, for the Commonwealth.

GREANEY, C.J. A Superior Court judge dismissed with prejudice indictments which charged each of three defendants (William D. Petras, William Marrocco, and Charles Camirand) with aggravated rape and indecent assault and battery. The judge concluded that the ultimate sanction was necessary because the prosecutor, after being warned once before by another

[1] One of the companion cases is against Petras, two are against William Marrocco, and two are against Charles Camirand.

judge, failed to bring to the grand jury's attention an inconsistent statement made by the victim at the probable cause hearing on the cases. The Commonwealth has appealed. We reverse the orders.

The eighteen year old victim's (we shall call her Carol) testimony of the incident and other relevant background information can be summarized as follows. Carol had been acquainted with the defendant Camirand. Camirand invited Carol and her girlfriend (also eighteen) to go out with him on the evening of August 2, 1985. Camirand, accompanied by the defendants Petras and Marrocco, picked up the two women in a van. The back of the van was equipped with a bar, two captain's chairs, two "beanbag" chairs, and a mattress. The group went to a lounge in Newburyport, where the men drank heavily. When the group left the lounge, the three men appeared to Carol to be intoxicated.

Camirand, the van's driver, ignored the young women's requests to be taken home, and he eventually drove the van down a deserted road. He took Carol's friend outside the van to talk to her, leaving Carol alone in the back of the van with Petras and Marrocco. According to Carol, Petras and Marrocco "jumped" on the mattress on which she was sitting. Marrocco positioned himself "up towards [her chest]," while Petras was down "towards [her] legs." Marrocco began kissing Carol and pulling off her shirt and bra. She pushed him away and pleaded with him to stop. Marrocco held her down, began to kiss her breasts, and attempted to force his penis into her mouth. While Marrocco restrained Carol, Petras unbuttoned and pulled off her jeans and underpants. Petras placed his fingers and then his tongue into Carol's vagina. He then inserted his penis into her vagina.

The attack stopped when Carol's girlfriend returned to the van. The group left in the van. The women were upset. Camirand drove Marrocco home and then stopped the van again. He then went into the back of the van and asked Carol to "give him some satisfaction." The two women fled the van and ran into some nearby woods. They eventually reached the security office of a factory and called the police. Carol was

taken to the Wilmington police station and then to the Lahey Clinic, where she was examined by a physician. While at the clinic, Carol wrote out and signed for a policewoman a description of the incident.

In her written statement for the police, Carol referred to Petras as the one who had "tried" to have sexual intercourse with her. Later in the same statement, she identified Petras as the "one who had intercourse with her." The hospital record contained an entry that noted "? of penetration" and further stated (under the heading "clinical notes") that "the patient thinks no vaginal penetration."

We next summarize the procedural history of the case. Carol testified about the incident along the lines outlined above at a lengthy probable cause hearing in a District Court. She was cross-examined by counsel for each of the three defendants and was impeached with the information in her police statement and the hospital record. At this hearing, she indicated that Marrocco, while holding her down, had tried to insert his penis into her mouth but was unsuccessful, as she had "shut her mouth" and turned her head away. In cross-examination by Marrocco's counsel, she further testified as set forth in the margin.[2] At the close of the probable cause hearing the prosecutor indicated to the District Court judge that the Commonwealth was proceeding against Marrocco solely on a joint venture theory.[3]

---

[2] COUNSEL FOR MARROCCO: "[Carol], Mr. Marrocco didn't penetrate your vaginal area with any part of his body, did he"?

CAROL: "Mr. Marrocco tried getting his penis into my mouth, but I wouldn't open it."

COUNSEL FOR MARROCCO: "He didn't penetrate any part of your body with any part of his body, did he?"

CAROL: "Mr. Marrocco?"

COUNSEL FOR MARROCCO: "Yes."

CAROL: "No. He was up — he was on the top half of me."

[3] The prosecutor made this point in the following statement to the judge:

"I'll get right to the point. Marrocco's charged with rape on a joint venture theory, that he along with Petras raped [Carol]. He held [Carol] down so that she could not do anything except try to squeeze back in the rear of the van. He held her hands, as she testified, as

The prosecutor secured indictments against the three men from a grand jury based on Carol's testimony of the incident. Petras moved to dismiss the indictments against him due to the failure of the prosecutor to advise the grand jury of the information (quoted above) contained in Carol's written statement to the police and in the hospital record. After a hearing, a Superior Court judge (not the judge whose order led to this appeal) allowed Petras' motion and dismissed the indictments against him without prejudice. The judge reasoned, based on the decided cases as he viewed them, that the grand jury should have been apprised of the inconsistencies, which, he concluded, might have affected their decision to indict Petras.

The prosecutor decided not to appeal from the dismissal because of the time that the appeal would have taken and because reindictment had been permitted. He entered nolle prosequis on the indictments against Marrocco and Camirand and went before another grand jury with Carol to secure new indictments against all three defendants. Carol's testimony before the second grand jury repeated her testimony at the previous proceedings, except with respect to Marrocco's conduct. Specifically, she testified, as set forth below, that Marrocco had in fact forced his penis into her mouth.[4] Despite this addition to her testimony, the prosecutor did not allude to Carol's probable cause testimony about Marrocco's attempt to penetrate her. See note 2, *supra*. However, the prosecutor did bring out the inconsistencies concerning the actions of Petras thought material by the first judge. Based on Carol's testimony, the second grand jury voted the indictments at issue.

The three defendants next moved to dismiss the second round of indictments on the ground that the integrity of the grand

Mr. Petras committed his acts of rape."

Camirand is apparently accused on a theory of accessorial liability, based on his alleged activity as driver and lookout and his alleged actions in luring Carol's girlfriend outside of the van so that she could not interfere in the assaults about to take place inside.

[4] THE PROSECUTOR: "What was Mr. Marrocco doing while Mr. Petras was doing that to you?

CAROL: "He was trying to get his penis into my mouth, and then he succeeded."

jury had been impaired because the prosecutor (a) had not sufficiently cured the deficiencies described by the first judge and (b) had improperly withheld Carol's testimony at the probable cause hearing that Marrocco had not violated her.[5]

After a hearing, a second Superior Court judge dismissed the indictments charging each defendant with aggravated rape and indecent assault and battery. The judge essentially concluded that the defendants had demonstrated that the integrity of the second grand jury had been compromised. The judge deemed the new fact pertaining to Marrocco, as testified to by Carol before the second grand jury, when left unbalanced by her inconsistent testimony at the probable cause hearing, a significant distortion caused by the prosecutor's intentional withholding of exculpatory evidence. The judge further concluded that the failure to inform the grand jury of this inconsistency, considered with the fact that Petras' indictments had already been dismissed once, called for dismissal with prejudice of the aggravated rape and indecent assault charges against all defendants as the only appropriate sanction.[6] We do not agree with these conclusions.

A prosecutor may not withhold known exculpatory information which could undermine the credibility of an important witness in the eyes of a grand jury and, consequently, affect their decision to indict. See *Commonwealth* v. *O'Dell*, 392 Mass. 445, 446-447 (1984); *Commonwealth* v. *Connor*, 392 Mass. 838, 854 (1984); *Commonwealth* v. *McGahee*, 393 Mass. 743, 746-747 (1985); *Commonwealth* v. *Mayfield*, 398 Mass. 615, 620-622 (1986); *Commonwealth* v. *McGowan*, 400 Mass. 385, 388-389 (1987). The prosecutor here was acutely aware from the prior dismissal that the next grand jury to hear

[5] A third ground alleged in the defendants' motions to dismiss concerned allegedly negative results obtained in "Rape Kit" tests. That ground was not argued to the judge and is not asserted on appeal.

[6] The judge's reasoning as to the dismissal of the indictments against Petras and Camirand reads as follows: "Because the indictments of Petras resulted from a presentation inexcusably inadequate in constitutional terms, and because validity of the other defendants' indictments depends on the constitutionality of the Petras' indictments, *the several motions of each defendant are allowed* . . ." (emphasis in original).

the cases should be alerted to possible inconsistencies in Carol's version of the incident. He complied with the order of the first Superior Court judge to bring to the attention of the second grand jury the information pertaining to Petras contained in Carol's statement to the police and in the hospital record.[7] Having done that, the prosecutor continued to focus on Petras as the principal actor in the aggravated rape. He sought to indict Marrocco for rape as a joint venturer based on Carol's testimony that Marrocco held her down while Petras removed her jeans and underpants and forcefully entered her vagina with his fingers, tongue, and penis.[8] See note 3, *supra*. There is basis to argue (as the Commonwealth does) that the prosecutor might not have considered the testimony before the second grand jury truly inconsistent because it was given in the context of Carol describing Marrocco pinning her upper body down and not entering her vagina. In any event, whether Marrocco succeeded in inserting his penis into Carol's mouth was a fact which can fairly be said was not considered crucial by the prosecutor to Marrocco's indictment for aggravated rape on a joint venture theory.[9]

The record, therefore, does not justify a conclusion that the prosecutor deliberately omitted the probable cause testimony with the "purpose prepense" of obtaining indictments. *Commonwealth* v. *Bobilin*, 25 Mass. App. Ct. 410, 413 (1988). See *Commonwealth* v. *Mayfield*, 398 Mass. at 621; *Commonwealth* v. *Seminara*, 20 Mass. App. Ct. 789, 793 (1985); *Commonwealth* v. *Childs*, 20 Mass. App. Ct. 985, 987 (1985); *Commonwealth* v. *Pond*, 24 Mass. App. Ct. 546, 551-552 (1987). At the worst, the record indicates that the prosecutor may have been negligent in his failure to comprehend all the

[7] Counsel for Petras argues that the prosecutor did not adequately cure the deficiencies identified by the first judge. We conclude that he did.

[8] The indecent assault and battery charge against Marrocco stemmed from Carol's testimony about his kissing, the fondling of her breasts, and the attempt to force his penis into her mouth.

[9] Similarly, it had nothing to do with the indictments against Camirand, who, as has been noted, was being charged as a participant with both Petras and Marrocco in the assaults based on Carol's testimony that he was the driver, lookout, and decoy. See note 3, *supra*.

nuances of Carol's testimony arguably contradictory in detail, in the context of proceedings which, unlike a trial before a petit jury, are meant to be accusatory and nonadversary. We assume that a negligent failure by a prosecutor to disclose exculpatory information to a grand jury may, in some circumstances, rise to a level that cannot be condoned. However, we do not consider any oversight here to be one that requires the ultimate sanction of dismissal with the consequent effect that stringent remedy has of infringing upon the public's right to see persons accused of serious crimes brought to trial. See *Commonwealth* v. *Cinelli*, 389 Mass. 197, 210 (1983). To hold otherwise in this case would run counter to the grand jury's primary role as "a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime." *Blair* v. *United States*, 250 U.S. 273, 282 (1919).

This view of the case is supported by another consideration. It cannot be persuasively argued on this record that had the added testimony been presented, the second grand jury would not have returned the indictments. Carol's testimony before that grand jury was both in reasonable detail and, in its material aspects, consistent with her testimony at the probable cause hearing and before the first grand jury. Her descriptions of the actions of Petras and Camirand did not vary. We doubt that knowledge of her inconsistent testimony as to one aspect of Marrocco's conduct would have so undermined her credibility in the eyes of the grand jury that they would have rejected her testimony against all the defendants and declined to return an indictment for rape or for indecent assault and battery. Cf. *Commonwealth* v. *Champagne*, 399 Mass. 80, 85 (1987).

We conclude: (a) that the evidence before the second grand jury was sufficient to warrant a finding of probable cause as to the aggravated rape and indecent assault and battery indictments against each defendant, see *Commonwealth* v. *Pond*, 24 Mass. App. Ct. at 552, and cases cited; and (b) that the defendants have not met the "heavy burden" imposed on them,

see *Commonwealth* v. *Shea*, 401 Mass. 731, 734 (1988), of demonstrating that the prosecutor knowingly distorted that evidence or withheld exculpatory information, which, if revealed, would have influenced the grand jury not to indict.[10]

The orders dismissing the aggravated rape and indecent assault and battery indictments against each defendant are reversed.

So ordered.

[10] Finally, because the Commonwealth has stated that its rape case against Marrocco is predicated on a joint venture theory, we think, in fairness, that it should be limited to that theory at trial. The Commonwealth will not be able to contend at trial that Marrocco raped Carol by inserting his penis into her mouth.

Appendix B

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.

SUPERIOR COURT
CRIMINAL ACTION
NO. 82-3295, 3926, 3297

COMMONWEALTH

vs.

WILLIAM D. PETRAS

MEMORANDUM AND DECISION ON DEFENDANT'S MOTION TO DISMISS INDICTMENTS

Defendant in the above captioned case stands indicted for assault with intent to commit aggravated rape and aggravated rape arising from an incident on August 3, 1985.

Defendant has moved to dismiss the indictments on the grounds that the prosecutor failed to disclose prior inconsistent statements of the victim, Renee Parah, and this failure to disclose prior inconsistent statements impaired the integrity of the grand jury proceedings. For the reasons stated below, defendant's motion is allowed, and the indictments against William D. Petras are dismissed without prejudice.

DISCUSSION

The Supreme Judicial Court has long held that a court will not review the competency or sufficiency of the evidence before a grand jury. *Commonwealth* v. *Salman*, 387 Mass. 160, 166

(1982). In *Commonwealth* v. *McCarthy*, 385 Mass. 160 (1982), however, the Supreme Judicial Court held that in certain circumstances grand jury indictments may be reviewed to maintain the integrity of the grand jury proceedings. *Commonwealth* v. *O'Dell*, 392 Mass. 445, 450 (1984). Since *McCarthy*, the Supreme Judicial Court has reviewed grand jury indictments in various circumstances, including where a police officer made a misleading presentation to the grand jury, *O'Dell, supra*, where the prosecution failed to produce exculpatory evidence to the grand jury, *Commonwealth* v. *McGahee*, 393 Mass. 743, 746-747 (1985), and where the prosecution withheld evidence that undermined the credibility of an important witness. *Commonwealth* v. *Connor*, 392 Mass. 838, 854 (1984).

In *Connor*, the court stated that where "evidence known to the prosecutor would greatly undermine the credibility of an important witness, the prosecutor must at least alert the grand jury to the existence of that evidence. If the grand jury were not made aware of evidence that is likely to have affected their decision to indict, then the appropriate remedy may be dismissal of the indictment." *Connor, supra* at 854.

In the present case, the victim, in her own hand, wrote out a statement regarding the events on August 3, 1985. In that statement, she referred to defendant Petras as the "one who had intercourse." Exhibit #1, p.1. Earlier in the same statement, however, she stated that the defendant "tried" to have sexual intercourse with her. *Id.* Because this prior inconsistent statement, *i.e.* whether the defendant had intercourse with the victim, goes to the very heart of the rape indictment, if the grand jury had been made aware of this inconsistency, it is likely to have affected its decision to indict. See *e.g. Connor, supra* at 854. This evidence undoubtedly was known by the prosecutor at the time of the indictment and the victim clearly was the most important witness to testify before the grand jury. *Id.*

In addition, the Lahey Clinic Medical Center report indicates in two places that there was a question of penetration. First, under "presenting complaint". The person who prepared the report noted "? of penetration." Second, under "clinical notes" it was noted that the patient "thinks no vaginal penetration." Surely these prior inconsistent statements, which were made soon after the incident should have been presented to the grand jury.

Although the court is convinced that defendant's motion to dismiss the indictments should be allowed, the Commonwealth may reindict defendant. *Commonwealth* v. *O'Dell*, 392 Mass. 445, 450 (1984). Thus, the indictments are dismissed without prejudice.

/s/_____

J. Grabau

Justice of the Superior Court

Appendix C

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS. SUPERIOR COURT
NOS. 2015, 2016, 2017

COMMONWEALTH OF MASSACHUSETTS

vs.

CHARLES CAMIRAND

DEFENDANT'S MOTION TO DISMISS INDICTMENTS WITH PREJUDICE

After hearing and on submission, it appears to the Court that the complainant had previously given testimony under oath at a probable cause hearing which was so at variance with her Grand Jury testimony as to greatly undermine her credibility. The Assistant District Attorney who was presenting the matter knew of the prior testimony, but did not bring it to the Grand Jury's attention. The question, therefore, is whether dismissal of the indictment is the appropriate remedy, *Commonwealth* v. *Connor,* 392 Mass. 838, 854 (1984). Ordinarily, a court should be slow to apply this "drastic" solution, *id.* at 855. Here, however: (1) the ADA, unlike his counterpart in *Connor, id.* at 855, did not disclose the prior inconsistency, and (2) a similar situation had already arisen in a connected case and had been the subject of a Motion to Dismiss and a Memorandum of Decision by another justice of this Court, *Commonwealth* v. *Petras,* Middlesex No. 85-3295/97 *per* Grabau, J. dated 5/25/86. The Grand Jury proceedings occurred

less than one month thereafter. No explanation has been offered as to why he did not inform the Grand Jury that his star witness had given sworn testimony, before a judge, that would directly contradict what she was telling the Grand Jury. Merely giving the unsworn contradictory matter was not sufficient. This is not like *Connor,* where the witness himself told the Grand Jury "that he had previously told a different story," and where "the prosecutor's questioning implied that [the witness] had *testified* differently before," *id.* at 855 (emphasis supplied). If, as the Supreme Judicial Court held, the *Connor* "prosecutor *minimally* fulfilled his duty to alert the grand jury to the existence of important exculpatory evidence," *ibid.* (emphasis supplied), the conduct in the present case fell short of the duty. Nowhere in his explanation of the witness (Grand Jury Min. 6/17/86 pp. 6-28) did the Assistant District Attorney so much as hint at the existence of contradictory *testimony, compare Commonwealth* v. *Connor, supra*, at 855 n.

Ordinarily, dismissed without prejudice to an indictment would be appropriate. Where, as here, defendant is indicted as a co-venturer, and the principal's indictment has already been once dismissed, the Court considers that affording the Commonwealth a third opportunity to obtain a constitutionally-proper indictment would render grand jury presentment, a right guaranteed by the United States Constitution, Amendment V, and the Massachusetts Declaration of Rights, Art. 12; *DeGolyer* v. *Commonwealth,* 314 Mass. 626, 632-633 (1943), a virtual rubber stamp. If the government can persist in its effort to indict, after its manifest failings here, the indictment process will not be what it has always been meant to be, a security against oppression, *Jones* v. *Robbins,* 8 Gray 329, 344 (1857).

Because the indictments of Petras resulted from a presentation inexcusably inadequate in constitutional terms, and because validity of the other defendant's indictments depends on

the constitutionality of the Petras indictments the *several motions of each defendant are allowed,* except for indictments *86-2016 and 86-2017*, which in no way relate to the fairness of the presentation against *Petras*. As to those, the Commonwealth has requested a stay pending its appeal of the dismissal of the other indictments. All defendants having assented, it is *so ordered.*

Hiller B. Zobel
Sept. 26, 1986 nunc pro tunc September 25, 1986

Appendix D

COMMONWEALTH OF MASSACHUSETTS.

Supreme Judicial Court

FOR THE COMMONWEALTH.

No. .

APPEALS COURT NO. 87-1146.

MIDDLESEX COUNTY.

COMMONWEALTH OF MASSACHUSETTS,
APPELLANT,

v.

WILLIAM D. PETRAS,
DEFENDANT-APPELLEE
(AND FIVE COMPANION CASES).

ON APPEAL FROM JUDGMENTS OF THE SUPERIOR COURT.

Application of Defendant-Appellee, William D. Petras, for Leave to Obtain Further Appellate Review.

The defendant William D. Petras respectfully requests leave to obtain further appellate review by the full Supreme Judicial Court. The prior proceedings, reported in 26 Mass. App. Ct. 483 (1988), are summarized in the appended opinion (Addendum at 11).

The points with respect to seeking further appellate review are:

1. Whether the conclusion of the Appeals Court that the prosecutor brought out the "inconsistencies . . . thought material by the first judge" is correct (Addendum at 14);
2. Whether, if correct, it cured the other inconsistencies;
3. Whether the absence of argument by defense counsel on the negative "Rape Kit" tests, alluded to in footnote 5 of the opinion, warrants a conclusion that the judge did not take that evidence into consideration (Addendum at 15);
4. Whether the inconsistent statements regarding Marrocco's alleged conduct, mentioned in the opinion, could have affected the grand jury's decision to indict (Addendum at 13).

Regarding the first point, at the probable cause hearing, the witness testified that in her own handwritten statement to the police, she wrote that Petras "tried" to "fuck her," but that she "kept pulling away" (A. II 127, 128). The only reasonable inference to be drawn therefrom is that Petras did not succeed. Instead of bringing out that part of the statement in its entire context to the second grand jury, the prosecutor merely asked whether, in that statement, she wrote that "they" tried to "fuck her." Then, instead of bringing out that she also wrote that she kept pulling away, he departed from the written statement and had her go on to testify that "they" succeeded (A. I 93-94). This fell far short of allowing that grand jury to have the benefit of the full impact of the witness' handwritten statement. Obviously, one would have to "try" to do something in order to do it. Without the "but I kept pulling away" phrase, the prosecutor might just as well have not brought out the statement at all. He successfully neutralized it.

Yet, the Appeals Court concluded that the prosecutor "did bring out the inconsistencies concerning the actions of Petras thought material by the first judge." (Addendum at 14.)

Regarding the second point, where there is no rule that required the judge to enumerate each and every material reason that he allowed the motion to dismiss the indictments against Petras, it cannot be concluded that because the first judge happened to mention some of the reasons, he did not also rely on other reasons. Even if it can be found that the prosecutor did bring out some of the inconsistencies actually spelled out by the first judge, this, by itself, did not excuse the prosecutor from alerting the second grand jury to the other material inconsistencies.

So far as the prosecutor's intent of withholding important exculpatory evidence is concerned, it is submitted that it rose beyond mere "oversight," as alluded to by the court (Addendum at 17). As stated in the opinion, the prosecutor here was "acutely aware from the prior dismissal that the next grand jury to hear the cases should be alerted to possible inconsistencies" in the witness' version of the incident (Addendum at 15-16). Yet, less than three weeks after that prior dismissal, the prosecutor not only failed to alert the second grand jury to the "but I kept pulling away" part of the witness' handwritten statement, but also neglected to alert the second grand jury to the fact that the witness, in that same written statement, said nothing about anybody touching her vagina or putting his tongue in her vagina and that Marrocco tried to put his penis in her mouth but that she "kept pulling away" (A. II 128). He also failed to alert the grand jury that she testified in court that although Marrocco "tried" to get his penis into her mouth, she "wouldn't open it" and that Marrocco did not penetrate "any part" of her body with "any part of his body" (A. II 80, 81), all in direct contradiction of what she was telling that second grand jury.

As further indication that all of the above clearly important exculpatory evidence was omitted not by oversight, but omitted

intentionally to obtain the indictments, instead of alerting that second grand jury to the absence of semen in the so-called "Rape Kit," the prosecutor, at the end of his presentation, brought out from the witness that she was given a contraceptive pill at the hospital (A. I 94). It would be almost impossible to conclude that at this point he did not have the negative "Rape Kit" in mind. It was undisputed that the said "Rape Kit" was "negative for any semen *or any other evidence of sexual intercourse*" (A. I 36, 59) (emphasis added). The same prosecutor was the one who supplied defense counsel with the "Rape Kit" report, in response to discovery motions, and who presented the cases at the probable cause hearing and to the first and second grand juries.

Regarding the third point, there is no requirement that defense counsel argue orally on every point already contained in his motion, affidavit and memorandum of law, especially where that point is conceded by the prosecution. Here, the Appeals Court, in footnote 5 of the opinion, seems to imply that because counsel did not argue to the judge on the negative "Rape Kit" nor assert it on appeal, counsel waived that point or that the second judge was thereby precluded from considering it (Addendum at 15). Clearly, this should not be a valid conclusion because Petras did not file the appeal. As appellee, he was not even required to file a brief, let alone have his case argued orally in the appellate court. Further, there is nothing to indicate that the second judge did not consider the negative "Rape Kit" results in his decision to dismiss the indictments with prejudice. In Petras' motion and affidavit, it was argued that the prosecutor failed to alert the grand jury to the negative results of the "Rape Kit" tests (A. I 31, 36). The prosecutor filed no counter-affidavit to contradict that fact, nor did the prosecutor deny it in oral argument on the motion. On the contrary, in his memorandum opposing the allowance of the motion, the prosecutor admits there was no evidence of semen

or sperm in the "Rape Kit" (A. I 59) and that the witness denies any ejaculation by Petras (A. I 60).

Defense counsel was not required to argue orally that which he had already argued in his motion and affidavit and which was conceded by the government to be true.

It is submitted that the intentional withholding of such critical evidence from the grand jury was, in all likelihood, considered by the judge and that it was one of the factors the judge had in mind when, in his decision, he wrote that the prosecutor's conduct "fell short" of even "minimally" fulfilling his duty to alert the grand jury to "the existence of important exculpatory evidence" (A. I 42).

Regarding the fourth point, as stated in the opinion, at the probable cause hearing the same witness testified that co-defendant Marrocco tried to get his penis into her mouth but was unsuccessful, as she had "shut her mouth" and turned her head away (Addendum at 13). Yet, she told the second grand jury that Marrocco had succeeded in getting his penis into her mouth, but despite this, the prosecutor "did not allude" to her prior contradictory testimony at the probable cause hearing (Addendum at 14). The opinion goes on to say that the prosecutor may not have considered it "truly inconsistent" because of the context in which it was given (Addendum at 16). Yet, the same prosecutor, as noted in the opinion, was so obviously aware of the witness' testimony at the probable cause hearing on this very point that at the close of that hearing he indicated to the district court judge that the Commonwealth was proceeding against Marrocco solely on a joint venture theory (Addendum at 13). The opinion goes on to state that, in effect, because the prosecutor may not have felt that inconsistency was crucial to his obtaining an indictment on a joint venture theory, he was, therefore, excused from bringing it to the attention of the grand jury (Addendum at 16-17).

It is submitted that it is highly unlikely that the same prosecutor who handled the cases from the beginning, all the way through the probable cause hearing and both grand jury presentations, less than three weeks apart, forgot or was confused by any "nuances" mentioned on page 17 of the opinion regarding the witness' testimony. On the contrary, allowing the witness to give glaringly inconsistent testimony which the prosecutor did not even need to support a joint venture indictment, is a further strong indication of his deliberate intent to obtain indictments regardless of the credibility of his witness. It would have been relatively simple for him to have had the witness explain that she did not comprehend the question at the probable cause hearing, in the same manner he had her explain that she thought "penetration" meant "ejaculation" when she told the hospital personnel that she felt she had not been penetrated (A. I 93). It is submitted that the prosecutor chose not to follow that course, lest the grand jury, after hearing one more material inconsistent statement, may not have believed any of that witness' testimony regarding any of the defendants. This, according to the case law, is what taints the integrity of a grand jury.

Clearly, exculpatory evidence which greatly undermines the credibility of an important witness must be revealed to a grand jury. It is submitted that, contrary to the conclusion stated by the Appeals Court (see Addendum at 17-18), had the grand jury had knowledge of the witness' inconsistent statements about Marrocco's conduct, it could well have undermined her credibility in the eyes of the grand jury to the extent that they may not have returned indictments against any of the defendants. In some respects, the court seems to treat the grand jury evidence as though it were evidence given at a trial, i.e., that the grand jury could accept or reject any and all evidence it heard. This, of course, is not the case because the grand jury was not even furnished with the exculpatory evidence to give them the opportunity of balancing it against the inculpatory evidence.

For example, the court concludes that the evidence before the second grand jury was "sufficient" to warrant the indictments (Addendum at 17). Petras does not claim otherwise. Petras agrees that any grand jury should have indicted him on the selective and limited evidence presented by the prosecutor because on that evidence, standing by itself, there would probably be no reason to doubt the witness' testimony. Petras, however, asserts that the inconsistent statements regarding Marrocco's conduct goes to the very heart of the issue of credibility of an important witness. Clearly, she was an important witness.

As a result of the cumulative significance of all four points raised, it follows that it was well within the judge's discretion to dismiss the indictments with prejudice and that he acted correctly in so doing.

In support of its opinion on pages 17-18 thereof, the Appeals Court cited *Commonwealth* v. *Shea,* 401 Mass. 731 (1988) and *Commonwealth* v. *Pond,* 24 Mass. App. Ct. 546 (1987).

In *Shea,* "the motion judge was unconvinced that false or misleading evidence had been introduced" (401 Mass. at 734), while here the judge found that the witness' testimony at the probable cause hearing was "so at variance with her grand jury testimony as to greatly undermine her credibility." (A. I 41.) This is a clear indication that the judge found her testimony to be either "false" or "misleading" or both.

In *Pond,* the court spells out what constitutes the burden on the defendant to show that the integrity of the grand jury was impaired. It stated:

> While there is no rule requiring prosecutors in all instances to bring exculpatory evidence to the attention of grand juries, their intentional withholding of the exculpatory portions of statements made by the defendant or by important witnesses, while introducing the inculpatory portions of such statements, may

> result in such a distortion as to permit or require the dismissal of an indictment. To support a claim that the integrity of the grand jury proceedings has been impaired, the evidence (1) must have been given with the knowledge that it was false or deceptive, (2) must have been given with the intention of obtaining an indictment, and (3) must probably have influenced the grand jury's determination to hand up an indictment. The defendant, as the moving party, has the burden of showing the existence of all three elements listed above.

24 Mass. App. Ct. at 550-551.

Clearly, the motion judge found that Petras did show the existence of all three elements. He listed some of the facts he found which formed the basis for some of his reasons for dismissing the indictments with prejudice. They are:

1. The aforementioned statement that the witness' contradictory testimony greatly undermined her credibility (A. I 41);
2. The assistant district attorney who was presenting the matter knew of the prior testimony, but did not bring it to the attention of the grand jury (A. I 41);
3. Even though less than one month earlier, a judge had dismissed the indictments under a similar situation, no explanation was offered as to why the prosecutor did not inform the grand jury that his star witness had given sworn testimony before a judge that would directly contradict what she was telling the grand jury (A. I 41);
4. The conduct of the prosecutor fell short of his duty to alert the grand jury to the existence of important exculpatory evidence (A. I 42);

5. Nowhere in his examination of the witness did the assistant district attorney so much as hint at the existence of contradictory evidence (A. I 42);

6. Petras' indictments resulted from a presentation inexcusably inadequate in constitutional terms (A. I 42);

7. That, although ordinarily, dismissal without prejudice to reindict would be appropriate, to afford the Commonwealth a third opportunity to obtain indictments would render grand jury proceedings a virtual rubber stamp (A. I 42);

The judge was not required to list all of his reasons for dismissing the indictments, but even some of the ones he did choose to mention strongly indicate that he found that Petras sustained his burden of showing the existence of the three elements mentioned above. Certainly, there is nothing in the record to show otherwise, and judges' subsidiary findings of facts should be accepted on appellate review unless there is clear error. *Commonwealth* v. *Monteiro*, 396 Mass. 123, 131 (1985). No clear error is shown here. On review, judges' ultimate conclusions are entitled to substantial deference. *Commonwealth* v. *Harvey*, 390 Mass. 203, 205 (1983). The judge's decision, therefore, should have been affirmed.

Conclusion.

For the reasons stated, leave to obtain further appellate review should be granted.

Respectfully submitted,

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Appendix E

Supreme Judicial Court for the Commonwealth

OFFICE OF THE CLERK, 1412 COURT HOUSE, BOSTON, MA 02108 (617) 725-8055

Date November 30 1988

No. FAR-4871

In re

COMMONWEALTH
vs.
WILLIAM D. PETRAS
(and five companion cases)

The above-captioned Application for Further Appellate Review has been

DENIED

Jean M. Kennett,
Clerk